IN THE

Supreme Court of the United States

October Term, 1960

No.

LUCILLE G. BECKENDORN,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, a banking corporation, Administrator of the Estate of Carl Beckendorn, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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IN THE

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OCTOBER TERM, 1960.

No. ...

LUCILLE G. HECKENDORN,

Petitioner,

vs.

THE FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, a banking corporation, Administrator of the Estate of Carl Heckendorn, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner Lucille G. Heckendorn prays that a writ of certiorari issue to the Supreme Court of Illinois to review a decision of that Court affirming a judgment of the Circuit Court of LaSalle County, Illinois, striking her complaint and dismissing her action against the respondent The First National Bank of Ottawa, Illinois, a banking corporation, as Administrator of the Estate of Carl Heckendorn, Deceased, with directions that she should take nothing by her suit and that the defendant should go hence without day at plaintiff's cost.

Opinions Below.

The opinion rendered by the trial court is set out in the Statement, p. 6. It was never published.

The opinion rendered by the Supreme Court of Illinois is set out in the Appendix. It is published and is printed in the reports as (1960) 19 Ill. 2d 181, 166 N.E. 2d 571.

Jurisdiction.

The decision of the Supreme Court of Illinois was rendered on March 31, 1960, and a timely petition for rehearing was denied on May 16, 1960. Time for filing a petition for writ of certiorari would have expired on August 15, 1960, but on August 12, 1960, Mr. Justice Clark granted a motion for an extension of time for filing to and including September 1, 1960.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3); 28 U.S.C.A. §1257(3).

Questions Presented.

Whether a state statute or common law rule that neither husband nor wife may sue the other for a tort to the person committed during coverture is unconstitutional in that it is arbitrary and unreasonable in depriving the injured person of the right to security of person (life) and property and equal protection of the laws of the state in violation of the 14th Amendment, Section 1 of the Constitution of the United States.

Whether a state statute or common law rule that neither a widower nor widow may sue the estate of a deceased spouse for a tort to the person committed during coverture is unconstitutional in that it is arbitrary and unreasonable in depriving the injured person of the right to security of person (life) and property and equal protec-

tion of the laws of the state in violation of the 14th Amendment, Section 1 of the Constitution of the United States.

Whether a state statute which provides that neither husband nor wife may sue the other for a tort to the person committed during coverture, and that neither a widower nor widow may sue the estate of the deceased spouse for a tort to the person committed during coverture, enacted subsequent to the date of a marriage contract at which time such actions were permitted, and under which contract it was the duty of each spouse to protect the other, is unconstitutional as a violation of Article 1, Section 10 of the Constitution of the United States in that it impairs that obligation of the marriage contract.

Constitutional And Statutory Provisions Involved.

This case involves the validity of Chapter 68, Section 1, Illinois Revised Statutes, 1953, 1955, 1957, and 1959 providing:

> "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture. An attachment or judgment in such action may be enforced by or against her as if she were a single woman."

It amended the Act of March 30, 1874, Chapter 68, Section 1, Illinois Revised Statutes 1951 providing:

> "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried. An attachment or judgment in such action may be enforced by or against her as if she were a single woman.",

which had been construed by the Supreme Court of Illinois in *Brandt* v. *Keller*, 1953, 413 Ill, 503, 109 N.E.2d 727, to

include an action for a tort to the person committed during coverture.

The constitutional provisions against which the validity of the statute and the common law rule reestablished by it are to be tested are Article I, Section 10 of the Constitution of the United States and the 14th Amendment Section 1 of the Constitution of the United States.

Statement.

The appeal by Petitioner to the Supreme Court of Illinois was an appeal from a judgment dated February 5, 1959, in the Circuit Court of LaSalle County, Illinois, dismissing her complaint and ordering that she take nothing by her suit and that respondent go hence without day at plaintiff's cost, on a complaint for personal injuries sustained by her in an automobile accident in Illinois resulting from the wilful misconduct of her deceased husband, who was killed in the accident, in driving his automobile, in which she was riding as a guest, on the ground that her action was barred by Chapter 68, Section 1, Paragraph 1, Illinois Revised Statutes 1957, with an express finding that the statute is not unconstitutional as contended by petitioner, and that there is no just cause why the judgment should not go into effect or why there should not be an immediate appeal.

The complaint alleges that on December 15, 1956, the deceased was driving his automobile in an easterly direction on United States Route 52 to its intersection with Illinois Route 59 in Will County, Illinois, with petitioner and another as guest passengers; they were in the exercise of all due and ordinary care for their own safety and were not guilty of any wilful, wanton, or reckless conduct; there was in operation at the intersection an official

traffic-control device for control of eastbound and westbound traffic, with red and green lights; the decedent wilfully, wantonly, and with reckless disregard for the consequences of his acts, drove his automobile into the intersection in violation of the traffic-control device, causing it to collide with a northbound automobile in the intersection, greatly, severely and permanently injuring and damaging each of them as specified in the complaint, and praying damages in the sum of $75,000.00.

Respondent filed a motion to dismiss the action insofar as petitioner is concerned on the ground that the decedent was her husband and that under Chapter 68, Section 1, Paragraph 1, neither husband nor wife may sue the other for a tort to the person committed during coverture. Petitioner responded admitting that the deceased was her husband at the time of the accident but stating "(a) said statute is unconstitutional in that it deprives her of a remedy for a tort inflicted on her person, in violation of Article II, Section 19 of the Constitution of the State of Illinois; (b) said statute is unconstitutional in that it is arbitrary and unreasonable in depriving her of her right to security of person (life) and property and equal protection of the laws of the State of Illinois, in violation of Article II, Section 2 of the Constitution of the State of Illinois, and the Fourteenth Amendment, Section 1 of the Constitution of the United States; [and] (c) said statute is unconstitutional in that it violates Article I, Section 10 of the Constitution of the United States which provides that 'no State shall . . . pass any . . . law impairing the obligation of contracts', in that at the time plaintiff entered into her marriage with the deceased the law of the State of Illinois by statute provided that a married woman could 'in all cases' sue and be sued without joining her husband to the same extent as though unmarried, which

authorized a married woman to bring an action against her husband for a personal tort inflicted by him while the marriage relationship existed, and in creating an immunity not contemplated by the marriage contract the obligations of the marriage contract have been altered to her detriment without her consent, thus impairing the obligation of that contract."

On February 5, 1959, the Court granted the motion to dismiss stating: "The Court expressly finds that Chapter 68, Section 1, Paragraph 1, Illinois Revised Statutes 1957, does not deprive said plaintiff of a remedy for a tort inflicted on her person, in violation of Article II, Section 19 of the Constitution of the State of Illinois; does not deprive said plaintiff of her right to security of person (life) or property without due process of law, or constitute a denial to her by the State of Illinois of the equal protection of the laws, in violation of Article II, Section 2, of the Constitution of the State of Illinois, or the Fourteenth Amendment, Section 1 of the Constitution of the United States; and is not a legislative Act of the State of Illinois that in any way impairs the obligation of her marriage contract with the deceased, in violation of Article I, Section 1 of the Constitution of the United States."

Petitioner appealed to the Supreme Court of Illinois on the theory that the amendment to the Married Woman's Act of 1874 is unreasonable and arbitrary and a violation of Article II, Section 19 of the Constitution of Illinois in denying a remedy for a wrong; and of Article II, Section 2 of the Constitution of Illinois and the 14th Amendment, Section 1 to the Constitution of the United States in depriving her of her right to security of person and indemnity for its violation without due process of

law and denying to her the equal protection of the laws; and of Article II, Section 10 of the Constitution of the United States in impairing the obligation of the marriage contract that her husband protect her and refrain from wilfully injuring her by denying her any remedy for its violation; and, in any event, that the statute has no application after the marriage has been terminated by her spouse's death.

The Supreme Court of Illinois held that the proviso of 1953 was intended to bar the present action, that it could not say that the proviso is an unreasonable exercise of the police power and an arbitrary determination of the public policy of the State, and that it did not violate Section 19, Article II of the Illinois Constitution or the due process clauses of either the State or Federal constitutions. The opinion of the Supreme Court of Illinois notes that the rule complained of "applies equally to husband and wife" but makes no mention of the equal protection clause itself, although the issue of denial of equal protection of the laws was raised in and passed on by the trial court adversely to petitioner and was raised in and necessarily passed on by the Supreme Court of Illinois adversely to petitioner in affirming the order of dismissal. The failure to mention the equal protection clause is undoubtedly due to the fact that under Illinois law due process includes equal protection of the laws. *People* v. *Niesman*, 1934, 356 Ill. 322, 325; *Anderson* v. *Sheppard*, 1918, 285 Ill. 544, 551. It stated: " 'The vitality of the [immunity] rule in each jurisdiction depends upon the construction of the statutes emancipating married women' . . . the statutory proviso of 1953 . . . is a legislative determination of public policy and a command to return to the basic common-law doctrine which

immunized the husband from suits by his wife for a tort to her person. . . . As it was within the power of the legislature to determine public policy and grant such right in 1874, it was also within its authority in 1953 to change this policy concept and to partially withdraw such right." In doing so it ignored the decision of the United States District Court for the Western District of South Carolina in *Alexander* v. *Alexander*, 1956, 140 F. Supp. 925, 927, that "The Constitution and laws of the United States recognize that a married woman is a person and an individual and that she is entitled to the same protection of the law as other individuals regardless of ancient provisions of the common law . . . the common law of Florida has been abrogated by the Fourteenth Amendment to the United States Constitution." The Supreme Court of Illinois also ignored Petitioner's argument that "the vitality of the rule in each jurisdiction is dependent not on the construction of the statutes emancipating married women but upon the doctrine of *stare decisis* and the failure of the courts to abolish an ancient rule after the common law edifice of which it was a logical part has ceased to exist, and to apply constitutional provisions applicable to the situation as a weapon to abolish it." Petitioner's contention that the law impaired the obligation of the marriage contract in violation of Article 1, Section 10 of the Constitution of the United States was also disregarded.

ARGUMENT.

POINT I.

The 1953 Amendment To The Illinois Married Woman's Act Of 1874 Violates The 14th Amendment, Section I Of The Constitution Of The United States And Is Null And Void And Of No Effect.

On July 28, 1868, the 14th Amendment became part of the Constitution of the United States. It provides:

> "Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

To determine its meaning we must first resort to fundamental principles.

Blackstone said that there were three absolute rights under the common law:

> "(1) The right of personal security, (2) The right of personal liberty, and (3) The right of private property."

Bernard C. Gavit, Blackstone's Commentaries on the Law, p. 70; *Ritchie* v. *People*, 1895, 155 Ill. 98.

These are obviously the rights protected by the Fourteenth Amendment. The Constitution of the United States, therefore, provides:

> "Nor shall any state deprive any person of the right of personal security, the right of personal liberty, or the right of private property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Blackstone states that these absolute rights

> "are not required to be sacrificed by the laws of society to public *convenience*" (Italics ours).

Bernard C. Gavit, Blackstone's Commentaries on The Law, p. 70. Rather, they are to be enjoyed:

> "entire, except where the laws have laid them under *necessary* restraint." (Italics ours)

Bernard C. Gavit, Blackstone's Commentaries on the Law, p. 76.

Certainly, these rights are entitled to as great respect under our Federal Constitution as they were accorded by the common law—the unwritten constitutional law of England.

It follows that nothing can be due process that would require any absolute right to be sacrificed by the laws of society to public *convenience* or would lay it under *unnecessary* restraint.

The Constitution, therefore, provides:

> "Nor shall any state deprive any person of the right of personal security, the right of personal liberty, or the right of private property, by sacrificing it to public convenience or laying it under unnecessary restraint, nor deny to any person within its jurisdiction the equal protection of the laws."

Turning to the right of personal security, Blackstone starts from the fundamental precept that

> "Every man's person is sacred, and no one should meddle with it."

Bernard C. Gavit, Blackstone's Commentaries on the Law, p. 559.

He stated:

> "The right consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health and his reputation"

and includes the right

> "to security from the corporal insults of menaces, assaults, beating and wounding."

Bernard C. Gavit, Blackstone's Commentaries on the Law, pp. 70-71.

Blackstone then states:

> "Wherever the common law gives a right or prohibits an injury, it gives a remedy by action."

Bernard C. Gavit, Blackstone's Commentaries on the Law, p. 559, and, where there is not an adequate remedy it gives redress

> "by exacting a pecuniary satisfaction in damages."

Bernard C. Gavit, Blackstone's Commentaries on the Law, p. 556. He stated:

> "At the time of the injury, the party has acquired an inchoate right of damages, though such right be not fully ascertained, till they are assessed by law."

Bernard C. Gavit, Blackstone's Commentaries on the Law, p. 556. To vindicate his absolute right the injured party is "entitled to the regular administration of justice in the courts of law" (Bernard C. Gavit, Blackstone's Commentaries on the Law, p. 76), and to secure "redress in the ordinary forms of law." (Bernard C. Gavit, Blackstone's Commentaries on the Law, p. 556).

Our conclusion has never been more finely expressed than by the Supreme Court of Illinois in *The Wabash*,

St. Louis and Pacific R. Co. v. *Shacklet, Adm'x.* (1883), 105 Ill. 364, 379.

> "One of the primary rights of the citizen, sanctioned by the positive law of the state, is security to life and limb, and indemnity against personal injuries occasioned by the negligence, fraud or violence of others. This right avails against all persons whomsoever."

We now turn to the decisions of this Court to check the determination made on the basis of the fundamental principles of the common law.,

In the *Dartmouth College Case*, 1819, 4 Wheaton 518, 581-2, and *Bank of Columbia* v. *Okely*, 1819, 4 Wheaton 235, 244, this Court laid down the fundamental rule that due process of law is the protection of the general rules that govern society—established principles of private rights and distributive justice.

In *Truax* v. *Corrigan*, 1921, 257 U.S. 312, 332, this Court said:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, * * * so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hustado* v. *California*, 110 U.S. 516, 535, 4 Sup. Ct. 111, 28 L.Ed. 232."

And turning to a discussion of the equal protection clause stated at pages 332 and 333:

> "Our whole system of law is predicated on the general fundamental principles of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No

> man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws."
>
> "The guaranty [of equal protection] was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."
>
> "Immunity granted to a class however limited, having the effect to deprive another class however limited of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

and quoted the statement made by Mr. Justice Bradley in *Missouri* v. *Lewis*, 1879, 101 U. S. 22, 31, that:

> "it seems that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in the same place and under like circumstances."

and the statement made by Mr. Justice Matthews in *Yick Yo* v. *Hopkins*, 1885, 118 U.S. 356, 369, that:

> "the equal protection of the laws is a pledge of the protection of equal laws."

You particularly stated that it means that all person "should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrong." (p. 334) which statement had previously been made in *Barbier* v. *Connelly*, 1884, 113 U.S. 27, 31.

In *Goesaert* v. *Cleary*, 1948, 335 U.S. 464, 466, this Court said:

> "The Constitution in enjoining the equal protection of the laws upon States precludes *irrational* discrimination as between persons or groups of persons in the incidence of the law." (Italics ours)

In *Sweatt* v. *Painter*, 1950, 339 U.S. 629, 635, this Court said:

> "'Equal protection of the laws is not achieved through *indiscriminate imposition of inequalities.*' *Shelly* v. *Kraemer*, (1948) 334 U.S. 1, 22 (1948)." (Italics ours)

In *Hernandez* v. *Texas*, 1953, 347 U.S. 475, 478, this Court said:

> "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated."

In *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 1955, 348 U.S. 483, 489, this Court said the equal protection clause prohibits "*invidious discrimination*". (Italics ours)

In 1959 you concluded that due process does not freeze the law in a strait-jacket for in *Frank* v. *Maryland*, 1959, 359 U.S. 360, 371, this Court said:

> "Of course, this wise reminder, that what free people have found consistent with their enjoyment of freedom for centuries is hardly to be deemed to violate due process, does not freeze due process within the confines of historical facts or discredited attitudes. 'It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent

catalogue of what may at a given time be deemed the limits or the essential of fundamental rights.' *Wolf* v. *Colorado*, 338 U.S. 25, 27."

In *Chicago, etc., R. Co.* v. *Keith*, 1902, 67 Ohio St. 279, 295, 65 N.E. 1020, 1024, 60 L.R.A. 525, the Court said:

> "If at common law private property might be taken for public use, or taken for public use without compensation, or taken or destroyed without due process of law, then our constitution has rendered inoperative the common law in that regard, because under our constitution private property shall ever be held inviolate, and where taken for public use compensation therefor must be first made in money; and every person for an injury done him in his land, goods or person shall have remedy by due course of law. The common law in so far as it conflicts with these provisions of the constitution is inoperative. There is nothing so sacred in the common law, that it should override a constitution or a statute. Much of our constitution was adopted, and many of our statutes enacted, to get rid of the imperfections and injustice of the common law."

16 C.J.S. 140, on the authority of the case quoted, states: "The common law is repealed by the constitution to the extent it is inconsistent therewith."

In *Kaukauna* v. *Green Bay & Canal*, 1891, 142 U.S. 254, 269-71, this Court denied a motion to dismiss a writ of error on the ground that:

> "inasmuch as the act of the legislature complained of was enacted in 1848, and the Fourteenth Amendment was not adopted until 1868, the provision of the latter against the 'depriving' a person of property without due process of law has no application to this case."

This Court said:

> "It was not the act itself which deprived the Water Power Company of its property, but the proceedings taken under the act, and so far as such proceedings were taken subsequent to the constitutional amendment, they fall within its inhibition."

In *Beall* v. *Pinckney*, 1945, 5th Cir., 150 F.2d 467, 470, 161 A.L.R. 1281, 1286, the court said:

> "The [homestead] exemption is absolute and permanent unless abandoned. Created by the Constitution itself, in any conflict with older legislation favoring creditors it must be held superior to the statutory rights of creditors as to debts made since the Constitution."

In *State of Washington* v. *Coe*, 1957, 49 Wn. 2d 849, 852, the Court said:

> "By a long series of cases, which are collected in *Duncan Township* v. *Stayr*, 106 Wash. 514, 521, 180 Pac. 476, it was held that territorial statutes in conflict with the state constitution, were abrogated by the adoption of the constitution. A constitutional amendment operates to repeal or supersede all statutes which are inconsistent with the full operation of a constitutional amendment, *Ladd* v. *Tilton Bank* v. *Frawley*, 98 Ore. 241, 252; 193 Pac. 916; *Dawson* v. *Tobin*, 74 N.D. 713, 726, 24 N.W. 2d 737; *Curators of Central College* v. *Rose*, (Mo.) 182 S.W. 2d 145; *State ex rel. Dengel* v. *Hartmann*, 339 Mo. 200, 205, 96 S.W.2d 329; *Jelm* v. *Jelm*, 155 Ohio St. 226, 236, 98 N.E. 2d 401, 22 A.L.R. 2d 1300; 16 C.J.S. 134, §43."

The 14th Amendment repealed that portion of the common law and statutory law that is repugnant to it although the repugnancy was not recognized at the time of its adoption. The common law is no longer the test of

what is reasonable and unreasonable in the law. And it is no longer the test of what is constitutional and unconstitutional.

The right of personal security and indemnity for its violation is a fundamental and inherent right that is not required to be sacrificed by the laws of society to public *convenience* and avails against all persons whomsoever except where the law has laid it under *necessary* restraint. A husband and wife are human beings. They are entitled to be treated as such. They are a community of human beings. It is entitled to be treated as such. The unity of husband and wife is a fiction which this Court has recently held must be disregarded where the rights of the United States are concerned. It is our contention that it must be disregarded where the rights of the individual members of that community are concerned. Each has a right to be protected from the other and in many cases a suit for damages is the only remedy that has any meaning. In such cases a grave injustice is worked if the remedy is not provided.

The common law status and property basis on which the rule was based and in relation to which it may have appeared to be reasonable has disappeared and it is no longer reasonable. Accordingly, it gains nothing from the fact that it was a rule at common law, or from the fact that it is reenacted by statute, and it is unconstitutional if it is arbitrary, unreasonable and unnecessary in the atmosphere of a changed society which demands new rules in the framework of the common law and under the 14th Amendment to meet the needs of that condition.

In order to sustain the statute readopting the common law against the charge that it violates the 14th Amendment, this Court must be willing to hold that it is not

arbitrary, unreasonable, unnecessary, and inconsistent with the Constitution of the United States for a state to outlaw a husband and a wife from the protection of the ordinary tort rules that govern society and to deny either a pecuniary remedy against the other for any tortious wrong including even the most brutal sadistic, intentional felonious tort to the person which could in the extreme render the victim blind, deaf, dumb, insane, limbless, sexless, and pauperized, and the guilty spouse safely ensconced behind the moat of financial immunity.

The broad question, therefore, which is presented is:

Whether a state statute or common law rule when enforced by state courts that neither husband nor wife may sue the other for a tort to the person committed during coverature, to bar recovery for a wilful tort, no matter how brutal the tort or extensive the injury, is not such an arbitrary, unreasonable, and unnecessary, outlawry of both the husband and the wife—the marital community—from the ordinary tort rules that govern society, depriving an injured spouse otherwise entitled to maintain an action of a pecuniary remedy on the one hand, and granting to a guilty spouse otherwise unable to defend the action a mischievous immunity on the other, and so inconsistent with the letter and spirit of the 14th Amendment Section 1 of the Constitution of the United States as to constitute a deprivation by the state of the injured spouse's federal right to security of person and indemnity for its violation without due process of law, and a denial by the state to the injured spouse of that spouse's federal right to the equal protection of its laws, in violation of that amendment.

The question has been answered affirmatively by one Federal court.

In *Alexander* v. *Alexander*, 1956, 140 F. Supp. 925, 927, the United States District Court for the Western District of South Carolina, in a decision based on Florida law in an action for malicious prosecution held that a wife could sue her husband in tort. It said:

> "Section 1 of the Fourteenth Amendment of the Constitution of the United States is as follows: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'
>
> "The Supreme Court has held that the term 'person' is broad enough to include any human being who is a citizen of the United States. *Wong Wing* v. *United States*, 163 U.S. 288, 16 S. Ct. 977, 41 L. Ed. 140.
>
> "Not only the Constitution of the United States in the use of the word 'person' includes all individuals but the laws of the United States make the same provision by providing that, in construing the statutes of the United States, words importing the masculine gender include the feminine, and that the word 'person' includes individuals. 1 U.S.C.A. Sec. 1. The Constitution and laws of the United States recognize that a married woman is a person and an individual and that she is entitled to the same protection of the law as other individuals regardless of ancient provisions of the common law. . . . I am of the opinion that the common law of Florida has been abrogated by the Fourteenth Amendment to the United States Constitution . . ."

The conclusion that the rule is arbitrary, unreasonable, and unnecessary and unjust is supported by other authorities.

Prosser states:

> "Any tort action between husband and wife encountered at the outset the common law doctrine of the legal identity of the two. It has been said, whether humorously or not, that at common law husband and wife were one person, and that person was the husband—which is not strictly accurate, since the criminal law, at least, regarded them as separate individuals, and the wife could be named as a party to a civil action, even though her husband must be joined with her, if he were alive when suit was brought. But as to her personal and property rights, the very existence of the wife was regarded as suspended for the duration of the marriage, and merged into that of the husband, so that she lost the capacity to contract for herself, or to sue or be sued without joining the husband as the plaintiff or defendant. The husband acquired the right to possession and use of his wife's real and personal property, and he was entitled to all of her choses in action, provided that he 'reduced them to possession' during marriage by some act by which he appropriated them to himself, such as collecting the money or obtaining judgment in a suit in his own name. In turn he became liable for the torts of his wife, committed either before or during the marriage. It is perhaps idle to speculate at this late date as to how far the historical basis of these rules is a mixture of the Bible and medieval metaphysics, the position of the father of the family in Roman law, the natural law concept of the family as an informal unit of government with the physically stronger person at the head, or the property law of feudalism.
>
> "A combination of all these instances made it impossible to maintain a tort action between husband

and wife. If the man were the tort feaser, the woman's right would be a chose in action which the husband would have the right to reduce to possession, and he must be joined as a plaintiff against himself and the proceeds recovered must be paid to him; and if the tort involved property, the wife had no right of possession to support the action. If the wife committed the tort, the husband would be liable to himself for it, and must be joined as a defendant in his own action. As a result, it was held that neither spouse could maintain an action against the other for either a personal or a property tort, whether it was committed before or during marriage; and the action was not maintainable even after divorce, which came late in the English law, after these rules were well established. The wife received some limited protection from the criminal law, which refused to stand on the identity of the persons, except as to crimes involving the right to possession of property; and some intentional torts committed between husband and wife were recognized as a ground for separation or divorce. Likewise the equity courts disregarded questions of identity and protected the wife in any separate trust estate she might have, against the tortious conduct of the husband.

"*All this state of affairs belonged to a social order which has been dead for more than a century.* Beginning about 1844 statutes known as Married Women's Acts, or Emancipation Acts, were passed in all American jurisdictions, which were designed primarily to secure to a married woman a separate legal identity and a separate legal estate in her own property. The statutes differ widely in their language, and still more so as they have been construed by the courts, which received them in the beginning with no great enthusiasm, but have tended to deal with them more liberally in recent years. Reference must of course be made to the statutes of each jurisdiction. It may be said that, with a few exceptions, they confer upon

married women the separate ownership and control of their own property, including their choses in action, and the capacity to sue or be sued without joinder of the husband; and that the wife is made separately responsible for her own torts.

"Since the primary object of these statutes was to free the wife from the husband's control of her property, the courts have generally agreed that they enable her to maintain an action against him for any tort against her property interests. Thus she may recover from him for conversion or detention of chattels, for fraud, for trespass to land, for waste, or in an action of ejectment or unlawful detainer. Likewise, since the statutes destroy the unity of the persons and place them upon an equality, it is held that the husband may recover from the wife for similar torts as to his property.

"So far as personal torts are concerned, however, some two-thirds of the courts which have considered the question have refused, and still refuse, to construe the statutes to alter the common law rule. It is the prevailing view that neither spouse may maintain an action against the other for assault and battery, false imprisonment, malicious prosecution, defamation, or injuries resulting from negligence. And this is true even though the tort was committed and the action was begun before the marriage of the parties, or where the action is brought after the marriage has been terminated by annulment or divorce, or by the death of one spouse or even both. In some states this construction no doubt has been compelled by the language of the statute itself; but in by far the greater number it has been read into a statute which is silent on the subject of actions for personal torts.

"The courts which follow this majority view have buttressed their conclusion by inventing new arguments, not found in the early cases, for denying the remedy. Apart from *stare decisis* or judicial in-

ertia, and the policy of strict construction of statutes changing the common law, it has been said that such spouse has remedy enough in the criminal and divorce laws—which obviously is untrue, since neither compensates for the damage done, or covers all the torts that may be committed. Stress has been laid upon the danger of fictitious and fraudulent claims, on the very dubious assumption that a wife's love for her husband is such that she is more likely to bring a false suit against him than a genuine one; and likewise the possibility of trivial actions for minor annoyances, which might well be taken care of by finding consent to all ordinary frictions of wedlock—or at least assumption of risk! The chief reason relied upon by all these torts, however, is that personal tort actions between a husband wife would disrupt and destroy the peace and harmony of the home, which is against the policy of the law. This is on the bald theory that after a husband has beaten his wife, there is a state of peace and harmony left to be disturbed; and that if she is sufficiently injured or angry to sue him for it, she will be sued and deterred from reprisals by denying her the legal remedy—and this even though she has left him or divorced him for that very ground, and though the same courts refuse to find any disruption of domestic tranquility if she sues him for a tort to her property or brings a criminal prosecution against him. If this reasoning appeals to the reader, let him by all means adopt it.

"A minority of some fourteen jurisdictions, with the unanimous approval of legal writers, have followed the lead of the dissenting opinion of Mr. Justice Harlan, rejecting all these arguments as specious, and have construed the Married Women's Acts to prevent an action by one spouse for a personal tort committed by the other, whether it be intentional or negligent in character. The number of such jurisdictions has been increasing in recent years, encouraged by the presence of liability insurance in

automobile cases and other factors remaining to be considered. *The devastating attack on the old rule found in a number of recent decisions seems to leave no possible justification for it except that of historical survival.*" (Italics ours)

Prosser On Torts, 2nd. Ed. 1955, pp. 670, 675.

Vernier states:

"It is the writer's opinion that property actions and even personal tort actions within some limitations should be permitted. It is argued that by denying actions between spouses domestic tranquility will be protected, but at the stage in which a spouse wishes to sue there is usually little tranquility left. It is also urged that if such actions are permitted the Court will be filled with trivial suits. It is submitted that this may be answered by recognizing, as to unimportant acts technically torts, an implied consent and license arising from the marriage relation. *In cases of more seriousness where there is no license, grave injustice is often worked by denial of a legal remedy.* Many negligent actions might be denied on the ground that there is an assumption of risk where there is a common law enterprise by husband and wife. *Where this is not true an action should be allowed.* At any rate it is unfortunate that the Legislatures have been loath to decide which policies are controlling." (Italics ours)

Vernier—American Family Laws, 1935, Vol. III, p. 269.

Harper and James state:

"But a strong and probably increasing minority view permits the wife to sue her husband for such harm, especially if they are intended wrongs. *This result seems eminently desirable. The metaphysical and practical reasons which prevented such action at common law are no longer applicable. . . . Sound policy and ordinary fairness commend the right of the*

wife to recover for tortious invasions of her interests and personality by her husband." (Italics ours)

Harper and James, The Law of Torts, Vol. 1, p. 645.

43 ALR 2d 647, states:

"Although supported by decisions in only a minority of jurisdictions, the view which most law writers have characterized as the better rule, and which is gradually finding more widespread acceptance, is that a spouse may sue his or her spouse for personal injuries in exactly the same way that he might bring a suit for such injuries against the same party if the two were not married."

The annotator then cites cases from Alabama, Arizona, Arkansas, Colorado, Connecticut, Idaho, Kentucky, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and Wisconsin.

Before rendering the decision in the present case the Supreme Court of Illinois judicially determined the unreasonableness of the rule in two cases. In *Welch* v. *Davis*, 1951, 410 Ill. 130, 134, the Court said:

"Today the immunity can be based solely upon the ground that domestic tranquility is fostered by the prohibition of actions by a wife against her husband."

In *Brandt* v. *Keller*, 1953, 413 Ill. 503, 508, 510, 511, the Court said:

"In *Welch* v. *Davis*, 410 Ill. 130, . . . the Court . . . intimated that there is no longer any basis in law for the husband's common-law immunity from tort actions by his wife, and that it can find support only on the doubtful theory of preserving domestic tranquility. . . . Courts frequently retreat under the protection of that nebulous concept 'public policy', and piously

> chant that tort actions between spouses would destroy 'domestic tranquility', while at the same time giving approbation to criminal proceedings instituted by spouses against each other, and to actions on contracts or property rights between spouses . . . 'The rule embodies no tenable policy of morals or social welfare. To urge that it survives because it is an aid to conjugal peace disregards reality. Conjugal peace would be as seriously jarred by an action for breach of contract or on a promissory note or for an injury to property, all of which the law permits, as by one for personal injury.'"

Even the most casual reader of the opinion rendered by the Supreme Court of Illinois in the present case can readily perceive the apologetic tenor running throughout its tenuous woof and warp with the discernable glint of a plaintive cry for aid and succor from the legislative stricture that has been imposed upon it.

On June 27, 1960, this Court in *United States* v. *Dege*, 364 U.S. 51, October 1959 Term U.S. Supreme Court Bulletin 2315, unanimously held that a husband and wife are legally capable of conspiring to illicitly bring goods into the United States with intent to defraud the United States. This Court said it is not allowed "to be obfuscated by medieval views regarding the legal status of women and the common laws reflections of them."

> "'It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the ground upon which it was laid down have vanished long since, and the rules simply possess some blind imitation of the past.'"

You concluded:

> "For this Court now to act on Hawkins' formulation of the medieval view that husband and wife 'are

> esteemed but as one Person in Law, and are presumed to have but one Will' would indeed be "blind imitation of the past.'"

and

> "'It would be an idle parade of learning to document the statement that these common-law disabilities were extensively swept away in our different state of society, both by legislation and adjudication long before the originating Conspiracy Act of 1867 was passed."

It is our contention that the rule objected to is in the language of this Court "unnourished by sense" and "offensive to the ethos of our society" and "a doctrine that parrot-like has been repeated in decisions and texts" and statutes.

In *Montgomery* v. *Stephens*, 1960, Michigan, 101 N.W. 2d 227, 234-5 the court in holding that a wife and a husband could maintain a cause of action for loss of consortium said:

> "But it is urged that the precedent tie us. A wife, said the ancient precedent, could not sue because she was a legal nonentity. And, even if she could, she had no cause of action to assert because a servant has no 'right' to the services of her master. But none of this is true today, either as a matter of fact or as a matter of law. The Married Women's Acts and common constitutional provisions have wrought a revolutionary change. Legally, today the wife stands on a par with her husband. Factually, as we well know, her position is no less than that of an equal partner. The precedents of the older cases are not valid precedents. They are violative of women's statutory rights and constitutional safeguards. They are not of harmony with the conditions of modern society. They do violence to our convictions and our principles. We reject their applicability. The reasons for the old rule no longer obtaining, the rule falls with it. The obstacles to the wife's action were judge-

invented and they are herewith judge-destroyed. We conclude that the wife before us has pleaded a cause of action."

This statement is just as applicable to the common law rule under discussion as it is to the common law rule attacked in that case.

That the rule is arbitrary, unreasonable and unnecessary is supported by the fact that under the German Code, French Code, and Belgium Code, actions between husbands and wives for torts committed by one on the person of the other during coverture are permitted.

An unreasonable rule of the common law does not become reasonable when enacted in the form of a statute. The rule in question is a common law rule which has not been dependent on the construction of the statutes emancipating married women but upon the doctrine of *stare decisis* and the failure of the courts to abolish an ancient rule after the common law edifice of which it was a logical part has ceased to exist and to apply the constitutional provisions applicable to the situation as a weapon to abolish it.

The immunity rule was not the law in Illinois for 79 years and no one suffered as a result. Only two or three cases ever reached the appellate courts.

Insurance companies should be protected against fraudulent claims but not by making it pecuniarily safe for one spouse to maim, mutilate or murder the other.

POINT II.

The 1953 Amendment To The Illinois Married Women's Act Of 1874 Violates Article I, Section 10 Of The Constitution Of The United States And Is Null And Void And Of No Effect.

Article I Section 10 of the Constitution of the United States provides: "No state shall . . . pass any . . . law impairing the obligation of contracts." The marriage contract is subject to the plenary power of the state. But there must be some limitation on that power. A husband is under a contractual duty to protect his wife and under a contractual duty beyond any duty he may owe her as a member of society not to wilfully injure her himself. And during the period 1870 or 1874 to and including the entry of the parties into the marriage contract and to the amendment of the Married Women's Act of 1953 she had a remedy to force him to protect her on the one hand and to refrain from injuring her on the other and to recover damages from him for failure to protect her or for wilfully injuring her in violation of that contractual duty. To deny the remedy is to deny the duty and retroactively create a mischievous immunity not contemplated by the spouses when they entered into the marriage contract impairing the obligation of that contract. There is no doubt the State reserves the right to retroactively change the grounds for which divorce or separate maintenance may be had and to withdraw grounds for divorce and separate maintenance that previously existed and to deny divorce or separate maintenance under the police power of the state but petitioner denies that it has the power to change the nature of the contract by destroying the duty of the husband to protect his wife by destroying the pecuniary penalty for merely failing to do so let alone destroying

the duty of the husband to protect her by destroying the pecuniary penalty for wilfully injuring her.

REASON WHY THE WRIT SHOULD BE GRANTED.

The Supreme Court of Illinois has decided substantial federal questions affecting every married couple in thirty-seven states not heretofore determined by this Court and has decided them in a way not in accord with applicable constitutional principles.

As previously stated the Illinois rule complained of is the law in all except 14 states. The challenge to its constitutionality on the ground that it violates the 14th Amendment to and Article I Section 10 of the Constitution of the United States, challenges the validity of the law, common law or statutory law, in each of those jurisdictions, and involves the Federal constitutional rights of millions of married people and surviving spouses and is certainly substantial enough to justify consideration by and a decision either one way or another by the highest court in the United States. The question has never been decided by this Court and, as we have shown in our argument, has decided it in a way not in accord with applicable constitutional principles. (This Court did refuse to construe a statute as abolishing the rule in *Thompson* v. *Thompson*, 1910, 218 U.S. 611, over a vigorous dissenting opinion by Justice Harlan concurred in by Justice Hughes, but the constitutional issues were not raised.)

We are fully aware that this Court refused to review the decision in *Hanfgran* v. *Mark*, (1937), 274 N.Y. 22, 8 N.E.2d 47, (1937), 302 U.S. 641, which involved the validity of a statute abolishing common law actions for

alienation of affections and criminal conversation, for want of a substantial Federal question. That case, however, did not abolish all pecuniary remedies for tort regardless of the nature of the tort committed and extent of the injuries sustained and did not isolate any group of society from the ordinary tort rules that govern society when a tort is wilful. Furthermore, that case, confirms rather than tends to repudiate our position because it recognizes the new status of women in the United States for which we contend in holding that a wife's affections and society are not property.

It is true that case held that the marriage contract is subject to the plenary power of the legislature. We do not deny that fact. But we insist that power is not entirely unlimited and insist that the limit of that power has been reached in the statute and common law rule complained of in this case.

The rule embodies no tenable policy of morals or social welfare, and it is arbitrary, unreasonable, unnecessary, mischievious, and inconsistent with the 14th Amendment Section 1 to the Constitution of the United States, in that it outlaws a husband and wife, the marital community, from the ordinary tort rules that govern society and makes them prey to one another without benefit of pecuniary redress to the victim and fear of pecuniary retribution by the tortfeasor for even the most brutal felonious tort to the person that could be committed, both of which would be present if they were not married. Certiorari should be granted and this Court should hold the rule to be unconstitutional as a denial of equal protection of the laws and a deprivation of the right of personal security without due process of law and an infringement of the marriage contract.

Petitioner, accordingly, prays that this Petition be granted.

Respectfully submitted,

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APPENDIX I.

SUPREME COURT OF ILLINOIS.

Docket No. 35314—Agenda 12—January, 1960.

Lucille G. Heckendorn, Appellant, v. The First National Bank of Ottawa, Admr., Appellee.

MR. JUSTICE DAVIS delivered the opinion of the court:

This case presents the issue of whether a widow has the right to sue her deceased husband's estate for a tort committed during coverture. Plaintiff sued the defendant, as administrator of the estate of her deceased husband, for personal injuries resulting from her husband's alleged wilful misconduct on December 15, 1956. Upon motion of the defendant, the circuit court of La Salle County dismissed the complaint and entered judgment for the defendant on the ground that the action was barred by section 1 of "An Act to revise the law in relation to husband and wife." (Ill. Rev. Stat. 1957, chap. 68, par. 1.) Plaintiff has appealed to this court, the constitutionality of section 1 being directly involved.

This section provides that: "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture. An attachment of judgment in such action may be enforced by or against her as if she were a single woman."

The plaintiff contends that the enactment has no application after the marriage relationship has been terminated by death, or, in the alternative, that if it is applicable, it is an unconstitutional deprivation of plaintiff's rights. Defendant, however, maintains that the section is both reasonable and constitutional and that it bars this action. In resolving these issues, we must view the enactment in its historical perspective.

At common law a married woman had no separate identity before the law; she was regarded as a chattel with neither property nor other rights which were enforceable against anyone. Her husband owned all her property and asserted all of her legal and equitable rights. It therefore followed that a husband was immune from suits by his wife, either in tort or contract. *Brandt* v. *Keller*, 413 Ill. 503; *Welch* v. *Davis*, 410 Ill. 130; *Snell* v. *Snell*, 123 Ill. 403.

While the feudal basis of this common-law immunity has ceased to exist, we know of no court that has abolished it in the absence of legislative action. Modern jurisprudence has continued to recognize the anachronistic foundation of the common-law doctrine, but new bases of public policy have been advanced to justify adherence to it. (Anno. 43 A.L.R.2d 632.) The majority of the jurisdictions within the United States are in accord with our view as expressed in *Brandt* v. *Keller*, 413 Ill. 503, 506, where we stated: "The vitality of the [immunity] rule in each jurisdiction depends upon the construction of the statutes emancipating married women."

We have been critical of the common-law rule, and in *Welch* v. *Davis*, 410 Ill. 130, we permitted a wife's administrator to sue the executor of her deceased husband's estate under the Wrongful Death Act, for the benefit of her minor dependent daughter. Later in *Brandt* v. *Keller*, 413 Ill. 503, we considered the Married Women's Act of 1874 (Ill. Rev. Stat. 1951, chap. 68, pars. 1 to 21,) and its effect on the common-law prohibition against suits by a wife against her husband. We there held, as a matter of statutory construction, that the statute reflected a legislative intent to remove a married woman's common-law disability with reference to suing and being sued, so that she would be placed in the same status as if she were unmarried, and we refused to read the common-law disability into the clear language of the 1874 act.

Mindful of the effect of the decision in *Brandt* v. *Keller*, the legislature at its next session amended the Married Woman's Act to provide that "neither husband nor wife

may sue the other for a tort to the person committed during coverture." (Ill. Rev. Stat. 1953, chap. 68, par. 1.) We are now concerned with the force of this proviso.

Plaintiff contends that it does not apply to actions by a wife against her husband's estate after coverture has ended by death. We see no merit in this argument. The legislature created a statutory disability during the lifetime of the parties. Its intent was to prevent a cause of action from coming into being. If a cause of action could not exist in favor of the wife and against the tort-feasor husband, it could not survive his death. We find nothing in the language of the proviso to justify the anomalous conclusion that the existence of a cause of action between husband and wife is entirely dependent on the fortuitous event of the death of the spouse. We therefore conclude that the proviso of 1953 was intended to bar the present action.

We are then met with the argument that the enactment is beyond the power of the legislature and unconstitutional. Plaintiff first contends the proviso is contrary to section 19 of article II of the constitution of Illinois in that it denies her a remedy for a wrong. However, it is for the legislature to determine the public policy and the requirements of public convenience and welfare. We cannot say that the proviso in question constitutes an unreasonable exercise of the police power and an arbitrary determination of the public policy of the State: Cf. *Clark* v. *Storchak*, 384 Ill. 564; *Hindman* v. *Holmes*, 4 Ill. App. 2d 279.

Section 19 enunciates a basic policy of jurisprudence that serves both to preserve the rights recognized by the common law and to permit the fashioning of new remedies to meet changing conditions. However, this policy expression does not authorize us to create a cause of action unknown to the common law in the face of an express statutory prohibition. Substantially similar constitutional provisions have been held not to abrogate the common-law disability in *Woltman* v. *Woltman*, 153 Minn. 217, 189 N.W. 1022, and in *Gowin* v. *Gowin*, (Tex. Civ. App. 1924)

264 S.W. 529. Accordingly, we hold that section 19 of article II of the Illinois constitution does not require us to strike down the legislative prohibition of the present action.

Nor do we believe that the statutory proviso of 1953 violates the due process clauses of either the State or Federal constitutions. It is a legislative determination of public policy and a command to return to the basic common-law doctrine which immmunized the husband from suits by his wife for a tort to her person. In *Brandt* v. *Keller*, 413 Ill. 503, we held that by the adoption of the Married Woman's Act of 1874, the legislature intended to abolish the common-law disability of a wife to sue her husband in tort. We there acknowledged that such action was in derogation of the common law and that the legislature thereby created a new right and remedy unknown to the common law.

As it was within the power of the legislature to determine public policy and grant such right in 1874, it was also within its authority in 1953 to change this policy concept and to partially withdraw such right. This it did by a proviso which applies equally to husband and wife and is consonant with a widely held view of public policy as enunciated in a majority of decisions in this country. See: Anno. 43 A.L.R.2d 632.

It is not our place to criticize the policy determination of the legislature. Nor need we surmise our decision had this case come before us in the absence of legislation. We are only concerned with the authority of the legislature to abolish or limit, by a nonarbitrary statute, a right unknown to common law, which it had previously created. In this case, where no rights had vested, we are neither aware of a constitutional ban, (cf. *Hall* v. *Gillins*, 13 Ill. 2d 26; *Clarke* v. *Storchak*, 384 Ill. 564.) nor do we know of a court which has abolished the doctrine of marital disability in the absence of an applicable statute.

We therefore conclude that the 1953 proviso of section 1 is valid and bars this action. The judgment of the trial court is accordingly affirmed.

Judgment affirmed.